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Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | customerservice@portfoliomedia.com

Patents Shrugged: A Frightening Future Looms

Tuesday, Oct 30, 2007 --- Fifty years ago, novelist and philosopher Ayn Rand wrote of a society that hindered innovation and stifled the creative spirit. Atlas Shrugged told of a society where individual effort went unrewarded, where technological advancement was thwarted by short-term greed, and where the governments failed to serve the greater public good. Although fiction, some of these societal concerns are mirrored in various proposed changes to the patent laws today being considered.

At this moment, there are bills before Congress and new administrative rules at the United States Patent & Trademark Office that dramatically affect many long-established patent rights. Patents are limited exclusionary rights granted to inventors to help prevent others from using their invention without permission. Indeed, patents are actually brief windows during which an innovator can take advantage of their technological creation, i.e., twenty years from filing for the right. Afterwards, the innovation enters the public domain for all to use.

The provisions of the bills before Congress seek to "reform" the patent system and modify numerous aspects of the patent laws. A driving force in this reform movement is a perceived inequity in the present patent system between the information technology and software industries, which seek major reform, and many life sciences industries, which generally seek fewer reforms.

On this 50th anniversary of the publication of Atlas Shrugged, what would Ayn Rand say about the struggles going on now in Congress and at the Patent Office? At present, the House has passed a patent reform bill with some controversial provisions, and the Senate is considering passage of a similar version, albeit presently with some broader and even more problematic provisions. Lobbying efforts are intense, and titanic forces are now at play in regard to the Senate bill. Senator Leahy deems passage of significant patent reform necessary, but many other Senators feel otherwise.

One troubling aspect of this reform is that some of the more important proposals, e.g., adding a far simpler procedure for competitors to challenge and invalidate all patents at any time, are quite harmful to innovation long term. Although clearing out a few "bad" patents is a laudable goal, undermining the certainty and validity of all patents is detrimental to society. The message of hearings by the National Academy of Sciences and other groups over the past few years seems to have been drowned out by lobbying efforts and press attempts to demonize patents.

Concurrently with this patent reform movement in Congress, the Patent

Office recently initiated implementation of new rules for patent application procedures, which are far-reaching and draconian to most inventors, and which unfairly shift major burdens onto patent applicants. Further, far greater takings are in store, if additional rulemaking authority is granted to the Patent Office. Although the patent bar sympathizes greatly with the Patent Office, these cruel rules, lost in the mayhem of the lobbying clashes on patent reform in Congress, are unacceptable to all.

To forestall the implementation of these rules, GlaxoSmithKline recently filed suit in federal court to block them. Glaxo considers these rules as inappropriate takings and extraordinarily prejudicial to patentees that need some measure of flexibility in seeking patent protections, e.g., severe restrictions on the number of follow-up continuation patent applications will adversely affect their innovation. Further, the retroactive nature of the new rules undercuts the entire pipeline of nearly one million pending patent applications, making all patentees, small or large, subject to new and expensive procedures with unknown consequences. Various documents have been filed in support of Glaxo's opposition to the rules changes, and a hearing is scheduled for October 31, 2007, the day before what many are calling "Black Thursday," the date of rules imposition.

Technological advancement was mission critical in 1957 after the launch of Sputnik, creating millions of new jobs as our nation and the world soon entered the space race, the Information Age and the biotech revolution, generating many cutting-edge industries. Our laws gradually changed to support these and other increasingly important industries. To better cope with the interpretation of the patent laws, a new appellate court was formed twenty-five years ago, the Court of Appeals for the Federal Circuit, which has since shepparded clarified the patent laws, following the mandate of the Constitution to "promote the progress of Science and the Useful Arts."

Innovation comes in many forms, ever changing with the times and the scale of the human imagination. In the earliest days of our young nation, the steamboat, new plows and other advances were protected by patents. America's patent laws arguably had a big hand in making America the world power it is today. Indeed, our patent laws have often been copied by other nations, seeking to emulate our success. As new technologies were introduced, e.g., Morse's telegraph, Edison's light bulb, Hollerith's calculating devices (eventually becoming IBM), new chemicals, the transistor, life-saving and life-improving medicines, and a multitude of other advances, patents have helped protect them all, while also encouraging competition by design around and improvement patenting, thereby enabling scientific and technological advancement.

Although most feel that the disproportionate litigation effects felt by some industries is unfortunate, recent court cases have already softened some of the adverse consequences on these companies. For example, injunctive relief is no longer "automatic" for patentees, as per the recent eBay Supreme Court case. The present fear is that the bills passed by the Hill and now before the Senate go too far, curtail long-established rights too much and

undercut the very raison d'être of a patent system, causing irreparable harm. The protection of patents is important, if not critical, to the American way of life, something foreseen by our Framers who put this right directly into our Constitution.

American businesses and inventors are at present seeking to protect their investments by filing patents, and on occasion litigating them. Many others, however, are decrying patents, particularly some advances in software, as monopolistic and per se unfair. Americans, however, have long recognized that patents are, in the balance, good for them. Unfortunately, considerable press of late has cast aspersions on patents, eroding much of their good will.

In her novels, Ayn Rand well illustrated the deleterious effects of stifling innovation on a society. Although it is doubtful that innovators today will take the extreme measure and go on an intellectual strike, as do the protagonists in Atlas Shrugged, curtailing the advantages of patents, a form of property taking, will have an adverse impact on our society. Both the House and the Senate bills, without serious amendment, are fundamentally flawed and to the long-term detriment of the patent system and society as a whole. Although some provisions are laudable and worthy of further consideration, there are enough dangerous provisions in the bills to seriously undermine the downstream impact to U.S. citizens.

In particular, the inclusion of provisions to enable the Patent Office carte blanche to retroactively undermine the value of many hundreds of thousands of patent applications still being processed and all to come will serve as a deterrent to innovation and seriously upset the delicate balance of our patent system. Considerable new thought is needed to prevent Congress from granting imprimatur to an entirely unnecessary taking of unprecedented scale. Despite nearly unanimous disapproval, the new administrative rules being forced on American inventors by the Patent Office will definitely undermine innovation, a wellspring of American prosperity.

More serious thought is needed before we cripple the marvel of the present age, the U.S. patent system.

--By Raymond Van Dyke, Winston & Strawn

Raymond Van Dyke is a technology attorney in Washington, D.C. His views are his own and not those of his firm or his firm's clients.